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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
10

11 JOSEPH A. LEE,  
12 CDCR #AU-9231,

13 Plaintiff,

14  
15 vs.  
16

17 SAN DIEGO COUNTY JAIL,

18  
19 Defendants.  
20

Civil No. 15cv1236 LAB (NLS)

**ORDER:**

**(1) GRANTING PLAINTIFF'S  
MOTION TO PROCEED  
IN FORMA PAUPERIS  
(ECF Doc. No. 7)**

**AND**

**(2) SUA SPONTE DISMISSING  
COMPLAINT FOR FAILING TO  
STATE A CLAIM PURSUANT  
TO 28 U.S.C. §§ 1915(e)(2)  
AND 1915A(b)**

21 Joseph A. Lee ("Plaintiff"), a state inmate currently housed at the California  
22 Rehabilitation Center located in Norco, California, and proceeding pro se, initially filed  
23 a civil rights complaint ("Compl.") pursuant to 42 U.S.C. § 1983 (Doc. No. 1) in the  
24 Eastern District of California. On June 2, 2015, United States Magistrate Judge Kendall  
25 Newman determined that the actions giving rise to Plaintiff's claims arose in San Diego  
26 County and transferred the matter to the Southern District of California. (Doc. No. 4)

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1 Plaintiff did not prepay the civil filing fee required by 28 U.S.C. § 1914(a) when  
 2 he filed his Complaint; instead, he has filed a Motion to Proceed *In Forma Pauperis*  
 3 (“IFP”) pursuant to 28 U.S.C. § 1915(a) (Doc. No. 7).

4 **I.**

5 **PLAINTIFF’S MOTION TO PROCEED IFP**

6 All parties instituting any civil action, suit or proceeding in a district court of the  
 7 United States, except an application for writ of habeas corpus, must pay a filing fee of  
 8 \$400. *See* 28 U.S.C. § 1914(a).<sup>1</sup> An action may proceed despite a plaintiff’s failure to  
 9 prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C.  
 10 § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a  
 11 prisoner granted leave to proceed IFP remains obligated to pay the entire fee in  
 12 installments, regardless of whether his action is ultimately dismissed. *See* 28 U.S.C.  
 13 § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

14 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act  
 15 (“PLRA”), a prisoner seeking leave to proceed IFP must submit a “certified copy of the  
 16 trust fund account statement (or institutional equivalent) for the prisoner for the six-  
 17 month period immediately preceding the filing of the complaint.” 28 U.S.C.  
 18 § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified  
 19 trust account statement, the Court assesses an initial payment of 20% of (a) the average  
 20 monthly deposits in the account for the past six months, or (b) the average monthly  
 21 balance in the account for the past six months, whichever is greater, unless the prisoner  
 22 has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution  
 23 having custody of the prisoner then collects subsequent payments, assessed at 20% of  
 24 the preceding month’s income, in any month in which the prisoner’s account exceeds

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26 \_\_\_\_\_  
 27 <sup>1</sup> In addition to the \$350 statutory fee, all parties filing civil actions on or after  
 28 May 1, 2013, must pay an additional administrative fee of \$50. *See* 28 U.S.C. § 1914(a)  
 (Judicial Conference Schedule of Fees, District Court Misc. Fee Schedule) (eff. May 1,  
 2013). However, the additional \$50 administrative fee is waived if the plaintiff is granted  
 leave to proceed IFP. *Id.*

1 \$10, and forwards those payments to the Court until the entire filing fee is paid. *See* 28  
2 U.S.C. § 1915(b)(2).

3 In support of his IFP Motion, Plaintiff has submitted a certified copy of his trust  
4 account statement pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2.  
5 *Andrews*, 398 F.3d at 1119. The Court has reviewed Plaintiff's trust account statement,  
6 as well as the attached prison certificate verifying his available balances. Plaintiff's  
7 statements show he has insufficient funds in his prisoner trust account during the 6-month  
8 period preceding the filing of this action, and no available funds from which to pay any  
9 initial partial filing fee at this time. *See* 28 U.S.C. § 1915(b)(4) (providing that "[i]n no  
10 event shall a prisoner be prohibited from bringing a civil action or appealing a civil action  
11 or criminal judgment for the reason that the prisoner has no assets and no means by which  
12 to pay the initial partial filing fee."); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C.  
13 § 1915(b)(4) acts as a "safety-valve" preventing dismissal of a prisoner's IFP case based  
14 solely on a "failure to pay . . . due to the lack of funds available to him when payment is  
15 ordered.").

16 Therefore, the Court **GRANTS** Plaintiff's Motion to Proceed IFP (ECF Doc. No.  
17 7) and assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the  
18 entire \$350 balance of the filing fees mandated will be collected by the California  
19 Department of Corrections and Rehabilitation ("CDCR") and forwarded to the Clerk of  
20 the Court pursuant to the installment payment provisions set forth in 28 U.S.C.  
21 § 1915(b)(1).

## 22 **II.**

### 23 **INITIAL SCREENING PER 28 U.S.C. §§ 1915(e)(2)(B) AND 1915A(b)**

#### 24 **A. Standard of Review**

25 Notwithstanding IFP status or the payment of any filing fees, the PLRA also  
26 obligates the Court to review complaints filed by all persons proceeding IFP and by  
27 those, like Plaintiff, who are "incarcerated or detained in any facility [and] accused of,  
28 sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or

1 conditions of parole, probation, pretrial release, or diversionary program,” “as soon as  
 2 practicable after docketing.” *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these  
 3 provisions of the PLRA, the Court must sua sponte dismiss complaints, or any portions  
 4 thereof, which are frivolous, malicious, fail to state a claim, or which seek damages from  
 5 defendants who are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*,  
 6 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Rhodes v. Robinson*,  
 7 621 F.3d 1002, 1004 (9th Cir. 2010) (discussing 28 U.S.C. § 1915A(b)).

8 “[W]hen determining whether a complaint states a claim, a court must accept as  
 9 true all allegations of material fact and must construe those facts in the light most  
 10 favorable to the plaintiff.” *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *see also*  
 11 *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that § 1915(e)(2)  
 12 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). However, while  
 13 a plaintiff’s allegations are taken as true, courts “are not required to indulge unwarranted  
 14 inferences.” *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 681 (9th Cir. 2009) (internal  
 15 quotation marks and citation omitted). Thus, while the court “ha[s] an obligation where  
 16 the petitioner is pro se, particularly in civil rights cases, to construe the pleadings liberally  
 17 and to afford the petitioner the benefit of any doubt,” *Hebbe v. Pliler*, 627 F.3d 338, 342  
 18 & n.7 (9th Cir. 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)),  
 19 it may not, in so doing, “supply essential elements of claims that were not initially pled.”  
 20 *Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).  
 21 “Vague and conclusory allegations of official participation in civil rights violations” are  
 22 simply not “sufficient to withstand a motion to dismiss.” *Id.*

### 23 **B. 42 U.S.C. § 1983**

24 “Section 1983 creates a private right of action against individuals who, acting  
 25 under color of state law, violate federal constitutional or statutory rights.” *Devereaux v.*  
 26 *Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001). Section 1983 “is not itself a source of  
 27 substantive rights, but merely provides a method for vindicating federal rights elsewhere  
 28 conferred.” *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (internal quotation marks

1 and citations omitted). “To establish § 1983 liability, a plaintiff must show both (1)  
 2 deprivation of a right secured by the Constitution and laws of the United States, and (2)  
 3 that the deprivation was committed by a person acting under color of state law.” *Tsao*  
 4 *v. Desert Palace, Inc.*, 698 F.3d 1128, 1138 (9th Cir. 2012).

### 5 **C. Personal Liability**

6 As an initial matter, the Court finds that to the extent Plaintiff names “San Diego  
 7 County Jail” as the only Defendant, his claims must be dismissed sua sponte pursuant to  
 8 both 28 U.S.C. § 1915(e)(2) and § 1915A(b) for failing to state a claim upon which §  
 9 1983 relief can be granted.

10 Local law enforcement departments, like the San Diego Sheriff’s Department or  
 11 the County Jail, municipal agencies, or subdivisions of those department or agencies, are  
 12 not proper defendants under § 1983. *See Vance v. County of Santa Clara*, 928 F. Supp.  
 13 993, 996 (N.D. Cal. 1996) (“Naming a municipal department as a defendant is not an  
 14 appropriate means of pleading a § 1983 action against a municipality.”) (citation  
 15 omitted); *Powell v. Cook County Jail*, 814 F. Supp. 757, 758 (N.D. Ill. 1993) (“Section  
 16 1983 imposes liability on any ‘person’ who violates someone’s constitutional rights  
 17 ‘under color of law.’ Cook County Jail is not a ‘person.’”).

18 While the County of San Diego may be considered a “person” properly subject to  
 19 suit under § 1983, *see Monell v. Dept. of Social Services*, 436 U.S. 658, 691 (1978);  
 20 *Hammond v. County of Madera*, 859 F.2d 797, 801 (9th Cir. 1988), the County may be  
 21 held liable only where the Plaintiff alleges facts to show that a constitutional deprivation  
 22 was caused by the implementation or execution of “a policy statement, ordinance,  
 23 regulation, or decision officially adopted and promulgated” by the municipality, or a  
 24 “final decision maker” for the municipality. *Monell*, 436 U.S. at 690; *Board of the County*  
 25 *Comm’rs v. Brown*, 520 U.S. 397, 402-04 (1997); *Navarro v. Block*, 72 F.3d 712, 714  
 26 (9th Cir. 1995). In other words, “respondeat superior and vicarious liability are not  
 27 cognizable theories of recovery against a municipality.” *Miranda v. Clark County,*  
 28 *Nevada*, 279 F.3d 1102, 1109-10 (9th Cir. 2002).

1 “A municipality cannot be held liable solely because it employs a tortfeasor.”  
 2 *Monell*, 436 U.S. at 691; *Navarro*, 72 F.3d at 714. Instead, to allege a claim against a  
 3 municipality, Plaintiff must include in his pleading enough “factual content” to support  
 4 a reasonable inference to show that: (1) he was deprived of a constitutional right; (2) the  
 5 city or county had a policy; (3) the policy amounted to deliberate indifference to his  
 6 constitutional right; and (4) the policy was the “moving force behind the constitutional  
 7 violation.” *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 835 (9th Cir. 1996); *see also*  
 8 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir.  
 9 1996).

10 As currently pleaded, however, Plaintiff’s Complaint fails to state a claim under  
 11 28 U.S.C. §§ 1915(e)(2) and § 1915A(b) because he has failed to allege any facts which  
 12 “might plausibly suggest” that his medical care was effected pursuant to any municipal  
 13 custom, policy or practice implemented or promulgated with deliberate indifference to  
 14 his constitutional rights, or that it was the “moving force” or cause of his injury. *See*  
 15 *Hernandez v. County of Tulare*, 666 F.3d 631, 637 (9th Cir. 2012) (applying *Iqbal*’s  
 16 pleading standards to *Monell* claims); *Brown*, 520 U.S. at 404 (“[I]t is not enough for a  
 17 § 1983 plaintiff merely to identify conduct properly attributable to the municipality . . .  
 18 [t]he plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality  
 19 was the ‘moving force’ behind the injury alleged. That is, a plaintiff must show that the  
 20 municipal action was taken with the requisite degree of culpability and must demonstrate  
 21 a causal link between the municipal action and the deprivation of federal rights.” (italics  
 22 in original).

#### 23 **D. Inadequate Medical Care Claims**

24 Plaintiff alleges that he was denied adequate medical care when he was housed at  
 25 the San Diego Cental Jail. (*See* Compl. at 2.) Specifically, Plaintiff claims that “he was  
 26 overdosed on my seizure medication that resulted in my being hospitalized for four days.”  
 27 (*Id.*) However, only “deliberate indifference to a prisoner’s serious illness or injury [will]  
 28 state[] a cause of action under § 1983.” *Estelle v. Gamble*, 429 U.S. 97, 105 (1976); *see*



1 also *Clouthier v. Cnty. of Contra Costa*, 591 F.3d 1232, 1241-44 (9th Cir. 2010)  
 2 (applying *Estelle*'s Eighth Amendment deliberate indifference standard to inadequate  
 3 medical care claims alleged to violate a pretrial detainees' due process rights).

4 First, Plaintiff must allege a "serious medical need" by demonstrating that "failure  
 5 to treat [his] condition could result in further significant injury or the 'unnecessary and  
 6 wanton infliction of pain.'" *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1991),  
 7 *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997)  
 8 (en banc) (citing *Estelle*, 429 U.S. at 104). The "existence of an injury that a reasonable  
 9 doctor or patient would find important and worthy of comment or treatment; the presence  
 10 of a medical condition that significantly affects an individual's daily activities; or the  
 11 existence of chronic and substantial pain are examples of indications that a prisoner has  
 12 a 'serious' need for medical treatment." *Id.* at 1059-60.

13 The Court will assume, for purposes of screening pursuant to 28 U.S.C.  
 14 § 1915(e)(2) and § 1915A, that he had a serious medical need in October 2013 when he  
 15 was housed in the San Diego Central Jail. *See McGuckin*, 974 F.2d at 1059.  
 16 However, even assuming Plaintiff's medical condition and/or pain was sufficiently  
 17 objectively serious to invoke Eighth or Fourteenth Amendment protection, he must also  
 18 include in his pleading enough factual content to show that each Defendant he seeks to  
 19 hold liable acted with "deliberate indifference" to his needs. *McGuckin*, 974 F.2d at 1060;  
 20 *see also Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006). "This second  
 21 prong—defendant's response to the need was deliberately indifferent—is satisfied by  
 22 showing (a) a purposeful act or failure to respond to [the] prisoner's pain or possible  
 23 medical need and (b) harm caused by the indifference." *Jett*, 439 F.3d at 1096.  
 24 "Deliberate indifference is a high legal standard," and claims of medical malpractice or  
 25 negligence are insufficient to establish a constitutional deprivation. *Simmons v. Navajo*  
 26 *County*, 609 F.3d 1011, 1019 (9th Cir. 2010) (citing *Toguchi v. Chung*, 391 F.3d 1051,  
 27 1060 (9th Cir. 2004)).

28 Here, Plaintiff claims that jail staff was "medically negligent" when they gave him

1 medication to which he was allergic. (Compl. at 2.) However, inadequate treatment due  
 2 to malpractice, or even gross negligence, does not amount to a constitutional violation.  
 3 *Estelle*, 429 U.S. at 106.

4 Moreover, “deliberate indifference” is evidenced only when a prisoner can show  
 5 that the official he seeks to hold liable “kn[ew] of and disregard[ed] an excessive risk to  
 6 inmate health and safety; the official must be both aware of facts from which the  
 7 inference could be drawn that a substantial risk of serious harm exist[ed], and he must  
 8 also [have] draw[n] the inference.” *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).  
 9 Specifically, Plaintiff must allege “factual content,” *Iqbal*, 556 U.S. at 678, which  
 10 demonstrates “(a) a purposeful act or failure to respond to [his] pain or possible medical  
 11 need, and (b) harm caused by the indifference.” *Wilhelm v. Rotman*, 680 F.3d 1113, 1122  
 12 (9th Cir. 2012) (citing *Jett*, 439 F.3d at 1096). The requisite state of mind is one of  
 13 subjective recklessness, which entails more than ordinary lack of due care. *Snow v.*  
 14 *McDaniel*, 681 F.3d 978, 985 (9th Cir. 2012) (citation and quotation marks omitted);  
 15 *Wilhelm*, 680 F.3d at 1122.

16 Plaintiff does not identify, with any specificity, any individual whom he claims is  
 17 responsible for allegedly failing to provide him with adequate medical care. He has failed  
 18 to provide sufficient “factual content” to plausibly suggest that any party named as a  
 19 Defendant in this case acted with deliberate indifference. *Iqbal*, 556 U.S. at 678 (“The  
 20 plausibility standard is not akin to a ‘probability requirement,’ but it ask for more than  
 21 the sheer possibility that a defendant has acted unlawfully.”). “A difference of opinion  
 22 between a physician and the prisoner—or between medical professionals—concerning what  
 23 medical care is appropriate does not amount to deliberate indifference.” *Snow*, 681 F.3d  
 24 at 987 (9th Cir. 2012) (citing *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989));  
 25 *Wilhelm*, 680 F.3d at 1122-23. Rather, Plaintiff “must show that the course of treatment  
 26 the doctors chose was medically unacceptable under the circumstances and that the  
 27 defendants chose this course in conscious disregard of an excessive risk to [his] health.”  
 28 *Snow*, 681 F.3d at 988 (citing *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996))



(internal quotation marks omitted).

Accordingly, for this additional reason, the Court finds that Plaintiff has failed to adequately allege an inadequate medical care claim upon which § 1983 relief can be granted. *See* 28 U.S.C. §§ 1915(e)(2), 1915A(b); *Lopez*, 203 F.3d at 1126-27; *Rhodes*, 621 F.3d at 1004. Because he is proceeding *pro se*, however, the Court having now provided him with “notice of the deficiencies in his complaint,” will also grant Plaintiff an opportunity to amend. *See Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012) (citing *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992)).

### III.

#### CONCLUSION AND ORDER

Good cause appearing, **IT IS HEREBY ORDERED** that:

1. Plaintiff’s Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) (ECF No. 7) is **GRANTED**.

2. The Secretary of the California Department of Corrections and Rehabilitation, or his designee, shall collect from Plaintiff’s prison trust account the \$350 balance of the filing fee owed in this case by collecting monthly payments from the account in an amount equal to twenty percent (20%) of the preceding month’s income and forward payments to the Clerk of the Court each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2). ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.

3. The Clerk of the Court is directed to serve a copy of this Order on Jeffrey Beard, Secretary, California Department of Corrections and Rehabilitation, 1515 S Street, Suite 502, Sacramento, California 95814.

**IT IS FURTHER ORDERED** that:

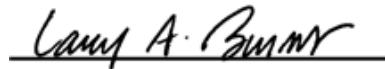
4. Plaintiff’s Complaint is **DISMISSED** without prejudice for failing to state a claim upon which relief may be granted. *See* 28 U.S.C. § 1915(e)(2) & § 1915A(b).

5. Plaintiff is **GRANTED** forty-five (45) days leave from the date this Order

1 is filed in which to file a First Amended Complaint which cures all the deficiencies of  
2 pleading noted above. Plaintiff's Amended Complaint must be complete in itself without  
3 reference to his original Complaint. *See* S.D. CAL. CIVLR 15.1. Defendants not named  
4 and all claims not re-alleged in the Amended Complaint will be considered waived. *See*  
5 *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). If Plaintiff fails to file an Amended  
6 Complaint within 45 days, this action shall remain dismissed without further Order by  
7 the Court.

8         6. The Clerk of Court is directed to mail Plaintiff a copy of a Court approved  
9 § 1983 civil rights complaint.

10  
11 DATED: June 30, 2015

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13 **HONORABLE LARRY ALAN BURNS**  
14 United States District Judge  
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